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Petitioner

MR. BURRELL JOHNSON, JR.
Wynne-Unit, A-4, 3-17
Huntsville, Texas
77340

"No. _____".

In The Supreme Court of The United States

"October-Term, 1981".

81 5021

Burrell Johnson, Jr., "Petitioner"

— V —

W. J. Estelle, Jr., "Respondent"

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth-Circuit.

Burrell Johnson, Jr. #241395.
Wynne-Unit, A-4, 3-12
Huntsville, Texas "77340"

("Petitioner")

In The

Supreme Court Of The United States

"October-Term, 1981"

"No." _____.

Burrell Johnson, Jr.,

"Petitioner"

—Vs—

W. J. Estelle, Jr.,

"Respondent"

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth-Circuit.

The Petitioner, Burrell Johnson Jr. Respectfully Pray's That A-Writ Of Certiorari Issue To Review The Judgment of The United States Court Of Appeals For The Fifth-Circuit Entered On The 20th of April-1981.

"Question's Presented For Review":

(1.) Whether The "Deceased-Death" was "Intentionally, Knowingly And Willingly, Caused-By-Petitioner"?

(2.) Whether Petitioner Received The Effective Assistance of Counsel And Co-Counsel?

(3.) Whether The State-Court of Conviction Errored in The Admonishment's; Not Applying It To-Counsel And CoCounsel & To-Prosecutor Before The Sentencing-Stage?

(4.) Whether The "Denial of "Facts-In-Issue", "Relevant-To-Issue's" And Res-Gestae; A-Denial of The U.S. Constitution And The Decision of The Supreme Court of The U.S.?

(5.) Whether The Denial of Admissible And Circumstantial-Evidence And Testimony, A-Denial of Petitioner's Right's And The U.S. Constitution And The Decision of The Supreme Court of The U.S.?

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("Ref.")

Johnson Vs. State, 527-S.W., 2d., 525 (Texas-Criminal-Appeals-1975")

"Opinion-Below".

The Court of Appeals Entered It's Memorandum Denying Petitioner's Application for Certificate of Probable-Cause, Leave to Appeal In-Forma Pauperis And Motion for The Appointment of Counsel.

"Jurisdiction".

On 20th April-1981, The Court of Appeals Entered Judgment Denying Petitioner's writ of Habeas-Corpus for The Conviction of Murder, In Violation of The 5th, 6th, 8th And 14th Amendment's To The U.S. Constitution; The Jurisdiction of This Court Is Invoked "Under-Title" 28-U.S.C. Section-1254".

(1). L/

"Constitutional-Provision's-Involved".

"U.S. Constitutional-Amendments, 5th, 6th, 8th, And 14th".

"Amendment-5". No-Person Shall-Be Held To Answer For A-Capital, OR-otherwise Infamous Crime, Unless ON A-Presentment OR-Indictment Of A-Grand-Jury, Except In Case's Arising In The Land OR-Naval Force's, OR-In The Militia, When In "Actual-Service" In Time of War-OR-Public Danger, Nor-Shall Any-Person Be Subject For The Same Offence To Be Twice Put In-Jeopardy Of "Life-OR-Limb", Nor-Shall Be Compelled In Any Criminal-Case To Be A-Witness Against-Himself, Nor-Be Deprived of Life, Liberty, OR-Property Without Due-Process of Law, Nor-Shall Private Property Be-Taken for Public-Use, Without-Just, Compensation.

"Amendment-6". In-All Criminal-Prosecution's, The Accused Shall-Enjoy The Right To A-Speedy And Public Trial, By An-Impartial Jury of The State And District Wherein The Crime Shall,

Have-Been Committed, Which District Shall Have-Been Previously Ascertained By Law, And To-Be Informed of The Nature And Cause of The Accusation; To-Be Confronted with The Witnesses Against-Him; To Have Compulsory-Process for obtaining Witness In His favor, And To Have The Assistance of Counsel for His Defence.

Amendment-8. Excessive-Bail Shall Not-Be Required, Nor-Excessive-fine's Imposed, Nor-Cruel And Unusual-Punishments Inflicted.

Amendment-14. (Sec. 1) All-Person's Born or-Naturalized In The United States, And Subject To the Jurisdiction Thereof, Are Citizen's of The United States And of The State Wherein They Reside, No State Shall-Make or-Enforce-Any Law which Shall Abridge The Privilege's or-Immunities of Citizen's of The United States, Nor-Shall Any State Deprive Any-Person of Life, Liberty, or-Property, Without-Dueprocess of Law, Nor Deny To Any-Person Within It's Jurisdiction The Equal-Protection of The Law.

A-Grand Jury Indictment Is The Means Whereby A-Defendant Is Brought To Trial In A-Felony Prosecution, It Is Not Evidence of Guilt Nor-can It Be Considered By You In Passing Upon The Question of Guilt of The Defendant, The Burden of Proof In All Criminal Case's Rest Upon The State Throughout The Trial, And Never Shift's To The Defendant.

All-Person's Are Presumed To Be Innocent And No Person May Be Convicted of An offense Unless Each Element of The offense Is Proved Beyond A-Reasonable Doubt, The fact's That He Has Been Arrested, Confined, OR-Indicted for, OR-otherwise Charged With The Offense Give's Rise To-No Inference of Guilt At His Trial.

Upon The Law of Self-Defense A-Person Is Justified In Using Force Against Another When And To The Degree He-OR-She Reasonably Believes The Force Is Immediately Necessary To Protect Himself Against The Other's Use OR-Attempted Use of Unlawful-Force,

"Protection Of Life-OR-Health." "Title-5, Sec. 9.34." "19.04." "19.02".

The Use Of Force Against Another Is Not-Justified In-Response To Verbal-Provocation Alone.

A-Person Is Justified In Using Deadly-Force Against Another.

(1.) If He Would Be Justified In Using Force Against The Other; And

(2.) If A-Reasonable Person In Petitioners's-Situation Would Not Have Retreated; And

(3.) When And To The Degree He Reasonably Believes The Deadly Force Is "Immediately-Necessary".

(A.) To-Protect Himself Against The Other's Use OR-Attempted Use Of Unlawful Deadly-Force; "OR"

(b) To-Prevent The Other's "Imminent-Commission" Of "Aggravated-Kidnapping, Murder, Rape, Aggravated-Rape, Robbery, OR, Aggravated-Robbery.

"Reasonable-Belief" Means A-Belief That Would Be Held By An-Ordinary And Prudent-Man In The Same-Circumstances As Petitioner.

"Unlawful" Means Criminal OR-Tortuous OR-Both And Includes What Would-Be Criminal OR-Tortuous But For A-Defense Not-Amounting To Jurisdiction OR-Privilege.

"Deadly-Force" Means Force That Is Intended OR-Known By The Petitioner To Cause, OR-In The Matter Of It's Use OR-Intended Use Is Capable Of Causing, Death OR-Serious Bodily Injury.

A-Person Acts Intentionally, OR-With Intent, With Respect To The Nature Of His Conduct OR-To A-Result Of His Conduct When It Is His Conscious Objective OR-Desire To Engage In The Conduct OR-Cause The Result,

It-Is Not-Necessary That There Should-Be Actual-Danger, As A-Person Has A-Right To Defend His Life And Person From Apparent,

Danger As fully And To The Same Extent As He Would Had The Danger Been Real, Provided He Acted Upon A-Reasonable Apprehension of Danger As It Appeared To Him From His Standpoint At The Time.

"Knowingly". A-Person Act's Knowingly, OR-With Knowledge, With Respect To The Nature of His Conduct OR-To-Circumstance's Surrounding His Conduct When He Is Aware of The Nature of His Conduct OR-That The Circumstance's Exist; A-Person Act's Knowingly OR-With Knowledge, With Respect To A-Result of His Conduct When He Is Aware That His Conduct Is Reasonably Certain To Cause The Result.

"Sudden-Passion". Sudden-Passion Means Passion Caused By And Arising out of Provocation By The Individual Killed OR-Another Acting With The Person Killed, Sudden-Passion Must Arise At The Time of The Offense And It Can not Be Solely The Result of Former Provocation;

"Adequate-Cause". Adequate-Cause Means Cause That Would Commonly Produce A-Degree of Anger, Rage, Resentment, OR- Terror In A-Person of Ordinary-Temper, Sufficient To Render The Mind Incapable of "Cool-Reflection"

"Voluntary-Manslaughter". A-Person Commit's The Offense of Voluntary-Manslaughter If He Cause's The Death of An-Individual Under Circumstance's That Would Constitute Murder, Except That He Caused The Death Under The Immediate Influence of Sudden Passion Arising From An-Adequate Cause, And All The fact's And Circumstance's In The Case In Evidence Be Considered, The Word's, Act's And Conduct, of The Deceased, At The Time And Prior To The Time of The Killing, And-To Consider Whatever Threat's, The Deceased May Have Made To Petitioner, And To-Consider Any-Difficulty OR- Difficulties Which The Deceased Had-Had With Petitioner, But In Doing So He Caused The Death Under The Immediate Influence of A-Sudden Passion Arising From "Adequate Cause, You" Should find Him Guilty of The Lesser Offense of Voluntary-Manslaughter

Statement Of The Case.

On June-8.1974 Petitioner Was Assessed A-Sentence of (99-Year's) Before A-Jury for the Offense of Murder, In Cause-No. 50.136, State of Texas Vs. Burrell Johnson, JR.

The Petitioner Is Presently In Custody of the Texas Department of Correction's By Virtue of A-Judgment And Sentence Issued In Cause-No. 50.136 In the 27th District Court of Bell County, Texas, for the Offense of Murder, the Petitioner Plead Not-Guilty to the Indictment and Was Tried Before A-Jury Which found Him Guilty of Murder And Assessed Punishment At ("99-Year's") In-the Texas Department of Correction's. From This Conviction, Due-Appeal Was Taken, And the Conviction Was Affirmed And An-Opinion Was Delivered On September-17.1975. (CRT-4). 4/

On March-28, 1977 Petitioner filed Hand Written Writ of Habeas Corpus With The District Court of Conviction, And was Ordered Back To The 27th District Court for Hearing on-Violations of Constitutional-Rights, The "Application for Writ of Habeas Corpus Was "Referred To The Court of Criminal of Appeals At-Austin, Texas, And was Denied Without "Written-Order, September-14, 1977, "Application-"No. 6479" ("CA-22,009") ("CR1").4/

On October-25, 1977, Petitioner Perfected A-Hand Written Federal-Writ of Habeas Corpus To the U.S. District Court for The Western District of Texas, At-Waco, Texas, "Filing-"Fee's" Payed-By Petitioner, U.S. Marshal's Service Payed-By Petitioner, Petitioner Was "Ordered-Back" for "Evidentiary-Hearing", By "U.S. Magistrate, Hon., Phil Sanders, "December-"4, 1978", Cause-No. W-77-CA-128, ("R1").3/

On the 23rd of February-1979, the U.S. Magistrate filed His Recommendation to the U.S. District Court, the District Court Entered It's Memorandum Denying Petitioner's Federal Writ of Habeas Corpus, March-30th 1979 ("R.I.").3/

A-Similar State Writ of Habeas Corpus Was Perfected And the Hon. Judge-Black, Stated the Application Was Without-Merit And Stated It Should-Be-Denied, In-Reference to the Violation of Petitioners 5th, 6th, 8th And 14th Amendments to the Constitution of the United States, Signed the 14th Day of February-1980 And Transmitted to the Court of Criminal Appeals of Texas, At-Austin, Texas And Was Denied Without Written-Order, On March-5, 1980, (Application-No. 6479) (Cause-No. 22,009)

("R.I.").3/

On March-3, 1980, Petitioner Perfected A-Federal Writ of Habeas Corpus While Case No., 22,009 Was Pending The Decision Rendered On March-5, 1980, The Order-of-Reference In Cause-No, W-80-CA-57 States In-Accordance With The Authority Vested In The United States Magistrate Pursuant To The Amended-Order For The Adoption of Rules for The Exercise of Power's And Performance of Duties By U.S. Magistrate's, Adopted In The Western District of Texas, On April-7, 1980, Hon., Robert B. O'Connor. And Petitioner Was Denied On The 23rd of February-1979, By-Hon., Magistrate, Phil Sanders.

("R.I.").3/

On November-17th, 1980 The Judgment And Recommendation of Hon., Jred Shannon And The Hon., Magistrate-Robert B. O'Connor Was Rendered From The U.S. District Court for The Western District of Texas, Denied In Cause-No., W-80-CA-57.

("R.I.").3/

On November-10th-1980, The Petitioner Perfected A-Federal Writ of Habeas-Corpus In The United States Court of Appeals For The Fifth-Circuit, At- New Orleans, Louisiana, No-Pending-Docket, 81-9008, ("R.I.") 3/

On April-20, 1981, Petitioner's Application For Certificate of Probable Cause, Leave To Appeal In Forma-Pauperis And For Appointment-of-Counsel, Was Denied Without-Written-Order, By The Hon. Henry A. Polit, Received From Deputy-Clerk, H.E. Adams, JR., ("R.I.") 3/

"Facts":

On The 23rd of April-1974 ("Afternoon") Petitioner Had "Clocked-Out" from Work At The "Wells-Meat-Plant", Where He "Worked" As An E-5 While In The "Military" from "Viet-Nam" And After Being "Honorable-Discharged" September-19th, 1973. Petitioner Had "Stopped" By "A-Military-Friend's" Home ("Donald Wilkin") "Here, Me" And "The Decease" Had "An-Argument" About The "Parking" of "Each" of "Our-Automobile's" (Serious-Arguments) "At-This", The "Decease" Left-To Go-Back To The "Base" At Fort Hood, Texas (Where-Lived) I-was told By "Mr. Donald Wilkin, The "Decease" Had Just Come "Returned" from "Germany" And That His "Knowledge" "Received" from The "Decease", Was That He Was "Pretty-Bad" And That He Had The "Belt" In The "Art" of "An-Expert" In "Karate", And for "Me" To-Try And "Stay-Out" of His ("Decease") Company, "Which-Petitioner Went-Home Ate And Showered "Changed-Clothes".

("C.R.T.) .4 /

Petitioner Then Went To My Girl-Friend's Apartment, Which We Purchased-together And We only-Stayed With Each-Other Over The WeeKend's, But Would Be-together Everyday, Her And My Step-Daughter And Step-Son, After-I-Arrived At Our-Apartment The Decease Car Was Parked Down, from Our-Apartment, Close To The Apartment Next-Door, I used The Knowledge Received About The Decease, After I Entered Our-Apartment Which Was Dimly-lighted,

("C.R.I") .4/

When Petitioner Entered Our-Apartment And The Individual That Jumped To The Door To MaKe Contact, Was Shot In Self-Defense, Once-In The Heart And Once In The NecK, My Girl-Friend Ms. Jeanetta Alexander Was Accidently-Shot In The Shoulder, I was Informed That The Individual Killed Was The Decease, Which My Girl-Friend And Her-Friend's And Mine Came And Gave Their Testimony To The Fact, That The Decease Was Killed In Self-Defense And That She Was Shot In Self-Defense,

("C.R.I.") .4/

In Cause-No. 50,136; State Of Texas Vs. Burrell Johnson, Jr. The Petitioner Contend's That This Honorable-Court Has Set The "Standard's" And Has Emphasized-Viewpoints Of The Constitutional-Rights At Issue And Has Jurisdiction Of The Judicial-Matters, Pursuant To 18-U.S.C., Section 3006-A(d)(6) And 46 Of This Court And Pursuant To 28 U.S.C., 2254, In-Regard's To The 5th, 6th 8th And 14th Amendment's To The Constitution Of The United States, As-Well-As The Constitution Of The State Of Texas And The Decision Of The Court Of Criminal Appeals For The State Of Texas As-Well-As The Decision Of The Supreme Court Of The United States As Herein Shown.

"The Petitioner Was Denied",

(1.) The Denial Of Effective-Assistance Of Counsel And Co-Counsel.

(2.) "Facts-In-Issue" And "Relevant-To-Issues" And "Res-Gestae".

(3.) "Improper-Admonishments", "And"

(4.) "The Admissibility Of Circumstantial Evidence And Testimony".

At Trial-Level A-Karate "Character-Witness From Fort Hood, Texas", Came To Testify For Petitioner That The Decease Could-Have Delivered "A-Killing-Blow" To The Petitioner, But The "Trial-Judge" Refused To Permit The Testimony And The Court Of Criminal Appeals' Said The "Trial-Judge" Was "Correct, Because Petitioner's "Character-Witness" Testimony Was Irrelevant" At The Time It Was Offered, Because The Petitioner "Had-Not" "Yet-Testified", But The "Karate-Expert" Could Have-Been "Called" "After" The Petitioner Had Testified.

(C.R.I.) 4

But The Petitioner's Counsel And Co-Counsel Fail To-Do-So And Caused Petitioner To-Be Denied Du-Process Of Law, A Fair-Trial, An-Excessive Amount of Time And The "Opportunities" For A-Probated Sentence OR-"At-Least" A-Sentence Of "Lessor-Severity Than The "Maximum-Punishment" For The "Crime"

The Petitioner "Asserts" The "Witnesses" "Testimony" Was "Essential" To-Show The "Jury" Which Was "Unfamiliar" With "A-Case" Of The "Sort" To-Show The "Development" Of "Self-Defense And To-Show The "Jury" The Petitioner's "State-Of-Mind" At The "Time" Of The "Offense And The "Petitioner's-Counsel" And Co-Counsel "Realized" The "Importance" Of "Presenting" The "Karate-Expert's "Testimony" To The "Jury", "However-Counsel "Failed" Through "Negligent's" To-Recall The "Karate-Expert" To-The "Stand", After His "Testimony" Became "Admissable".

("Rt.") .3/

The Petitioner-Asserts That The Arguments of Counsel And Co-Counsel During The Courts Punishment-Phase, So-Prejudiced And Inflamed The Minds of The Jury, That A-Term of 99-Year's Was Assessed Against The Petitioner And Caused Petitioner To-Be Denied Due-Process of Law. (R.R.) 3/

Reason's For Granting The Writ.

The Sixth-Amendment Is A-Constant-Reminder That If An-Accused Is Not Provided The Benefit of Effective-Counsel,

Justice Will-Not Be-Done.

The Amendment-Requires The Effective-Assistance of Counsel At Every-Step In The Proceeding Against An-Accused, Where His Liberty Is At The Mercy of The State.

Please-See-Principle(A.) In, Porter Vs. United States, 298 F. 2d. 461 (5th Cir.,) The Court-Stated, The Constitution-Guarantee's An-Accused The Effective-Assistance of Counsel. Whether The Attorney Is Court Appointed-OR-Retained.

Please-See-Principle(B.) Hofaths Vs. Dutton, 409 F. 2d. 651-10-At 654, The Sixth And Fourteenth Amendment Is The Federal-Constitutional Guarantee's, Each-Defendant In A-State Criminal Trial,

"Where Counsel Is Required, The Right To The "Effective-Assistance" Of "Counsel",

The "Conviction" Is "Termed" To-Be "Error-Free" By "Petitioner's-Counsel And Co-Counsel", Before The State Start The Legal-Process Of "Trying-To-Deprive" "Petitioner" Of His Liberty, The Assistance Of Counsel And "Co-Counsel" "Rendered" "In-Petitioner's" Behalf Was "Not The Kind Of Trial Demanded By The Sixth And Fourteenth-Amendment To The United States "Constitution",

"Please-See-Principle" (C.) Powell Vs. Alabama, 287-U.S. 45 (1932) Avery Vs. Alabama, 308-U.S. 444 (1940) Gray Vs. State, 428-S.W. 2d., 89; Beckam Vs. State, 120-S.W., 2d., 98; Fitzgerald Vs. Estelle, 505-F. 2d. 1334 (5th Cir.) 1974; McKenna Vs. Ellis, 280 F. 2d., 592 1960; Johnson, Vs. United States, 329 F. 2d., 600 (1976) Ruth Vs. State, 522-S.W. 2d. 517; Rockwood Vs. State, 524-S.W. 168; Walker Vs. Cladwell, 476 F. 2d. 213 (5th Cir.) 1973;

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Marshall Vs. United States, 360-U.S., 310.(1959).

"Please-See-Principle (D.) Chapman Vs. California, 386-U.S., 18(1969) Estes, Vs. Texas, 318-U.S. 523(1965) And The (Supreme-Court) Has Left No-Doubt That The Probability of Deleterious-Effect's On Fundamental-Right's Call's For Close Judicial-Security.

"Please-See-Principle (E.) Irvin Vs. Dowd, 366-U.S.-717, Hearing Vs. New York, 422-U.S., 853 (Constitutional-Right's) So-Basic Too A-Fair-Trial, That Their Infraction's Can-Never Be-Treated As A-Harmless Error And Haunted-Conviction.

"Please-See-Principle (F.) Chamber Vs. Florida, 309-U.S. 227(1948) Du-Process Requirement For A-Fair, Trial".

Johnson Vs. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461 ("1938") Though ..... The Amendment Lays-Down No-Rule for the Conduct of the States, the Question-Recurs Whether the Constraint-Laid By the Amendment upon the National Court's Expresses A-Rule So-Fundamental And Essential to A-Fair Trial, And-So, to Due-Process of Law, That It Is Made Obligatory upon the States, By the Fourteenth-Amendment. Relevant-Data on the Subject are offered By Constitutional And Statutory-Provision's Subsisting In the National Constitutional-Colonies And the States Prior to the Inclusion of the Bill-of-Rights, In the National-Constitution And In the Constitutional-Legislative And Judicial-History of the States to the Present-Date.

These Constitute the Most Authoritative-Source's for Ascertaining the Considered Judgment of the Citizens of the States upon the Question.

Price Vs. Georgia, 398 U.S. 323, 90 S.Ct., 1757, 26 L. Ed., 2d, 300 ("1970")

The Defendant Was Tried for Murder. But the Jury found Him Guilty of the Lesser-Included Crime of Voluntary-Manslaughter And Fixed the Sentence At 10-to-15 years, the Conviction was Reversed, Because of An-Erroneous-Jury-Instruction And A-New-Trial Ordered.

The Defendant was Again Placed On Trial for Murder Under the Original-Indictment, Since the Jury At the Second-Trial Was Instructed On the offense of Murder. It Could-Have found the Defendant Guilty of that offense, But, like the first-Jury, found Him Guilty of, Voluntary-Manslaughter.

Fixing the Penalty At 10-years Imprisonment A-UNANIMOUS Court Held, Per-Burger, C.J., that the Retrial Had Violated the Defendant's Constitutional Protection Against Being-Twice Put In-Jeopardy. Emphasis-Added By the Court. The first-Verdict, Limited As It was to the Lesser-Included offense Required that the Trial Be-Limited to that Lesser-Offense, the Court-Perceived No,

Relevant-Factual Distinction Between This Case And Green, Although The Defendant Was Not Convicted On The Greater-Charge, On-Retrial, Whereas Green Was, The Risk of Conviction-On The Greater-Charge Was The Same In Both-Cases And The Double-Jeopardy-Clause Of The Fifth-Amendment Is Written In Terms Of Potential-Or-Risk Of Conviction-Or-Not, Punishment, Inasmuch-As, As The Defendant Was Convicted Of The Same Offense At Both-Trials Suffered No-Greater Punishment On The Second Conviction. The Prosecution-Argued That The Second Conviction (Jeopardy) Was Harmless-Error When Judged By Criteria Of, Chapman Vs California, P-660, In-Rejection, This-Contention, The Court Observed, The Double-Jeopardy-Clause Is Cast In Terms Of The Risk-Or-Hazard Of Conviction, Not Of The Ultimate-Legal Consequences Of The Verdict To-Be Charged, And To-Be Subjected To A-Second Trial For First-Degree-Murder Is An-Ordeal Not-To-Be,

Viewed-lightly, further, and perhaps of more importance, we cannot-determine whether or-not the murder change against the defendant induced the jury to find-him guilty of the less-serious-offense of voluntary-manslaughter rather than to continue to debate his innocence,

Justice-Black, voiced fears that the principal-opinion seem's at-time's to proceed on the premise that the constitutional—principal ultimately at stake here is-not the defendant's right to counsel, in all-criminal prosecution's as guaranteed by the sixth-amendment and the fourteenth-amendment's. But rather a-right to a-fair-trial as conceived by-judge's,

Coleman Vs. Alabama, 399-U.S. 1, 90-S. Ct. 1999, 26-L. Ed. 2d. 387 (1970);

Pointer Vs. Texas, 380-U.S. 400, 85-S. Ct. 1065, 13-L. Ed. 2d. 923 (1965),

"Please-See-Principal" (U.) Griffin Vs. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)

Betts Vs. Brady, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)

"Mr. Justice Roberts" Delivered The Opinion "of The Court".

U.S. Supreme Court Gideon Vs. Wisconsin, 91 S. Ct. 490 (1971) "Footnote, No-12".

Allen Vs. Estelle, 568 F. 2d, 1108 (5th Cir.) ("1978").

David Ruiz Vs. Texas Dept. of Corrections, ("1972").

White Vs. Alabama, 568 F. 2d, 1108, (5th "Circuit) (1978),

Smith Vs. Digmon, 98 S. Ct. 597 (1978)

Chambers Vs. Maroney, 399. U.S. 42, ("1970");

U.S. Vs. Wade, 388. U.S. 218. 537. F. 2d. 1333 (5th Cir., 1976)

Maness Vs. Meyers. 419-U.S. 449 ("1975")

Butler Vs. State, 38-S.W. 46, 36, Tex. CR. R. 483;

"Please-See-Principal" (H.) Satterwhite Vs. State 177. S.W. 959, 77-Tex., CR., R. 130;

Persons Vs. State, 3-Tex., App., 240;

Kennedy Vs. State, 19-Tex. App., 618;

Edward Vs. West Texas Hospital, Tex. Civ. App., 89-S.W. 2d 801, 809.

"Beneficial-Evidence-Excluded, "Material" — "Evidence And Testimony-Beneficial" To The "Accused" Must-Not-Be, Excluded;

"Conclusion".

For The Reasons Foregoing, The Petitioner, Burrell Johnson Jr. Respectfully Request's That A Writ of Certiorari Issue To Review The Judgment of The United States Court of Appeals for The Fifth-Circuit And To Grant Petitioner Any Relief That The Court Deem's Just And Proper".

"Dated": "5-11-81",

"Respectfully-Submitted,"

Burrell Johnson, Jr.

Burrell Johnson, Jr., "241395".
Wynne-Unit, "A-4, 3-11"
Huntsville, Texas "77340"
("Petitioner")

"Perjury-Form".

I Declare Under The Penalties Provided By Title-18, Sec., 1001-U.S. That The Answer's And Statement's Contained Herein Are To The Best Of My Knowledge And Belief True. Correct And Complete.

"Executed-On", "5-11-81" :
("Date")

"Signature-Of-Petitioner/Appellant", Burrell Johnson, Jr.

"Notary-Form":

Subscribed And Sworn To Before Me, By The Said Burrell Johnson, JR. This 11th Day Of "May — 1981," Which Witness My Hand And Seal Thereto.

"Signature-Of-Petitioner" Burrell Johnson, Jr.,

R. P. FASSETT
NOTARY PUBLIC, IN AND FOR
WALKER COUNTY, TEXAS

R. P. Fassett

Notary Public In And For
Walker County, Texas
"77348"

"Notary-Form":

Subscribed And Sworn To Before Me, By The Said Burrell Johnson, Jr., This 18th Day of "June-1981", Which Witness My Hand And Seal Thereto.

"Signature-of-Petitioner, Burrell Johnson, Jr.."

C Combs III

Notary Public In And For
Walker County, Texas
"77340"

C.H. COMBS, III
NOTARY PUBLIC
IN AND FOR WALKER CO., TEXAS

TRIAL COURT NO. 22009

THE STATE OF TEXAS.

TO THE 27th. Judicial District Court of Bell COUNTY – GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 17th. day of September A.D. 19 75

the cause upon appeal to revise or reverse your Judgment between

Burrell Johnson Appellant ,

No. 50,136 vs.

The State of Texas, Appellee ,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR. , Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 3rd. day of October A.D. 19 75

GLENN HAINES
Clerk.

FILED
____ A.M. ____ p.m. o'clock
OCT 6 1975
OCT 6 1975
D. CARPENTER
District Court, Bell County, Texas
By _____ Deputy
By _____

Deputy Clerk.

"Appendix-A"

NO. 25,408

BURRELL JOHNSON	§	IN THE 27TH DISTRICT COURT
VS.	§	OF
W. J. ESTELLE, JR., DIRECTOR OF TEXAS DEPARTMENT OF CORRECTIONS	§	BELL COUNTY, TEXAS

PETITIONER'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON AN APPLICATION FOR WRIT OF HABEAS CORPUS

The Petitioner makes this his suggested Findings of Fact and Conclusions of Law after the Court has heard his application for Writ of Habeas Corpus:

HISTORY OF THE CASE

The Petitioner was convicted on a plea of not guilty of the offense of murder and was sentenced by the jury to 99 years in prison on June 8, 1974, in Cause No. 22,099.

That after conviction, an appeal was perfected in this cause and affirmed on September 17, 1975.

QUESTIONS RAISED IN APPLICATION

Petitioner alleges in his application for Writ of Habeas Corpus that he is entitled for release for the following reasons, to-wit:

1.

That the Attorney appointed by the trial Court to represent Petitioner in cause No. 22,099 in the 27th District Court of Bell County, Texas, Mr. Richard Petronis, rendered Petitioner ineffective assistance of counsel, thereby depriving Petitioner of a fair trial and due process of law, because he failed to properly present Petitioner's theory of self-defense at the trial level, by failing to call an expert witness to the stand to testify to the possibility of the decedant inflicting a Karate blow upon Petitioner.

2.

9-28-77

That Petitioner's other appointed counsel, Mr. Joe Petronis, rendered Petitioner ineffective assistance of counsel thereby depriving Petitioner of a fair trial and due process of law by alienating the jury against Petitioner when he argued with the jury's finding of guilty to the charge of murder. Mr. Joe Petronis, in his argument on punishment, chastised the jury for this finding of guilty which alienated the jury against Petitioner and resulted in

a 99 year sentence by the jury.

SUGGESTED FINDINGS OF FACT & CONCLUSIONS OF LAW

1.

That Mr. Richard Petronis rendered Petitioner ineffective assistance of counsel. Petitioner's only defense to the charge of murder was self-defense, as was admitted by Mr. Petronis during the Writ hearing (S.F.-50).

Also, Mr. Richard Petronis realized the importance of presenting Mr. Costello's testimony to the jury (S.F.-37). However, through neglect, Mr. Petronis failed to recall this witness to the stand after his testimony became admissable (S.F.-36). Thereby, in effect, presenting no defense at all for Petitioner.

The Court of Criminal Appeals in Patton v. State, 489 SW2d 906 (1973), found that Petiioner therein received effective assistance of counsel where Petitioner claimed that he had not because his attorney failed to call vital witnesses to present a theory of self-defense. The Court stated: "This ground of error finds no support...no contention is made that there were available witnesses which trial counsel did not call." The Court also said "We find nothing to show that there was available testimony on the issue of self-defense which was not utilized." If, in Patton, supra, there had been available witnesses to present on self-defense and Petitioner's attorney failed to call them to testify, the Court seems to say that defense counsel would then be ineffective. This is exactly Petitioner's claim in the instant case. A vital witness for Petitioner who could have presented evidence on the theory of self-defense was not called to testify even though available.

2.

Mr. Joe Petronis, brother and law partner of appointed counsel, Mr. Richard Petronis, and co-counsel at the trial level, alienated the jury in his jury argument on punishment by chastising them for their verdict. This prompted remarks by the prosecutor compounding the damage done by Mr. Joe Petronis, all of which harmed the Petitioner. This harm done was the direct result of ineffective assistance of counsel rendered Petitioner by Mr. Joe Petronis.

9-29-77

CONCLUSION

Petitioner respectfully would suggest that his release from custody be ordered on the two grounds complained of in his supplemental application for writ of habeas corpus.

Respectfully submitted,

Sam Appell

SAM APPELL
ATTORNEY FOR PETITIONER

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas ..... September 14, 1977

Dear Sir:

This is to advise that the Court has denied without written order the

.....application for writ of habeas corpus.....

.....

in Application No. ...6479....., ...Burrell Johnson, Jr.....

Sincerely yours,

Thomas Lowe, Clerk

Appendix-C.

DIST/DIVISION	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	$ DEMAND	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
542 6	77	0128	10	25	77	3	530	1					4210		77	0128

PLAINTIFFS

BURRELL JOHNSON, JR.

DEFENDANTS

W 77 CA 128

W.J. ESTELLE, JR.,
DIRECTOR, TEXAS DEPARTMENT OF
CORRECTIONS

CAUSE

Petition for writ of habeas corpus - 28 U.S.C. Section 2254

ATTORNEYS

Burrell Johnson #241395
Route 1, Box 1, A2-1-20
Huntsville, Texas 77340

John L. Hill
Attorney General of Texas
Catherine E. Greene, Assistant
P.O. Box 12548 Capitol Station
Austin, Texas 78711
512 475-3281

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	10-25-77	#16759 - $5.00		JS-5	11-1-77
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

"Appendix-D"

DATE	NR.	PROCEEDINGS W 77 CA 128
10-25-77	1	Petition for Writ of Habeas Corpus, filed (fee paid)
10-25-77		Summons for W.J. Estelle, Jr., issued & del. to Dep. Marshal in Waco
12-02-77	2	Summons for W. J. Estelle, Jr., returned & filed. Ex. 11-29-77 by L. Kibbe, DUSM ($22.24)
12-28-77	3	Respondent's Motion for Extension of Time, filed
1-16-78	4	Order, filed and entered (signed 1-12-78). Respondent is allowed an additional fourteen days within which to file his answer. Such answer shall be filed in this Court on or before 1-10-78. Copy to attorneys of record.
1-18-78	5	Respondent's Answer and Motion to Dismiss, filed
1-27-78	6	Plaintiff's Traverse Reply, filed
3-21-78	7	Certified copy of Transcript, The State of Texas vs. Burrell Johnson, No. 22,009, filed in original only. Forward to Judge Roberts.
3-21-78	8	Certified copy of Opinion in Burrell Johnson vs. The State of Texas, No. 50,136, filed in original only. Forward to Judge Roberts.
3-21-78	9	Certified copy of Appeal in Burrell Johnson vs. The State of Texas, No. 22,009, filed in original only. Forward to Judge Roberts.
3-21-78	10	Certified copy of Appellee's Brief in Burrell Johnson, Jr., vs. The State of Texas, No. 22,009, filed in original only. Forward to Judge Roberts.
3-21-78	11	Certified copy of Appellant's Brief in Burrell Johnson, Jr., vs. The State of Texas, No. 22,009, filed in original only. Forward to Judge Roberts.
3-21-78	12	Certified copy of Cause No. 25,408, Burrell Johnson, Jr., vs. W. J. Estelle, Jr., from 27th District Court of Bell County, Texas, filed in original only. Forward to Judge Roberts.
3-24-78	13	Order Denying Motion, filed and entered (signed 3-21-78). Respondent's motion to dismiss is DENIED, and Respondent is ORDERED to file the pertinent portions of the State Court records. Copy to attorneys of record, along with copy of docket entries.

FILED

JAN 16 1978

DAN W. BENEDICT, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BURRELL JOHNSON, JR., Petitioner	$	
VS.	$	CIVIL ACTION NO. W-77-CA-128
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	$	

ORDER

CAME ON this day for consideration, Respondent's Motion for Extension of Time, and the Court being of the opinion that such Motion should be granted, it is accordingly,

ORDERED, ADJUDGED and DECREED that W. J. Estelle, Jr., Director, Texas Department of Corrections, is hereby granted an additional fourteen (14) days within which to file his answer. Such answer shall be filed in this Court on or before January 10, 1978.

SIGNED AND ENTERED this 12 day of Jnuary, 1978.

UNITED STATES DISTRICT JUDGE

NOTICE OF EVIDENTIARY HEARING — Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

WESTERN DISTRICT OF TEXAS

WACO DIVISION

BURRELL JOHNSON, JR.

v.

W. J. ESTELLE, JR.

No. W-77-CA-128

TAKE NOTICE that the above-entitled case has been set for evidentiary hearing at 9:30 A.M., on Monday, December 4, 19 78, at the U. S. Courthouse, Magistrate's Courtroom No. 111, 200 West 8th Street, Austin, Texas.

Date November 15, 19 78

CHARLES W. VAGNER
Clerk.

By Curt Flemory
Deputy Clerk.

To ✓ Mr. Burrell Johnson #241395
Route 1, Box 1, Wynne Unit
Huntsville, Texas 77340

Ms. Catherine E. Greene, Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Hon. Phil Sanders
U. S. Magistrate
Room 111, U. S. Courthouse
200 W. 8th Street
Austin, Texas

Ms. Patsy Schlueter
Secretary to Judge Jack Roberts
Austin, Texas 78701

"Appendix-G"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

FILED
MAR 30 1979
CHARLES W. VAGNER, Clerk
By [signature] Deputy

BURRELL JOHNSON, JR.

V.

W.J. ESTELLE, JR., TEXAS DEPARTMENT OF CORRECTIONS

CIVIL ACTION NO. W-77-CA-128

ORDER

Pursuant to 28 U.S.C. § 636(b) and this Court's Local Rules for the Exercise of Powers and Performance of Duties by United States Magistrates, this case was referred for a hearing to United States Magistrate Philip Sanders. On February 23, 1979, the Magistrate filed his recommendations, finding the Plaintiff's allegation that he was denied effective counsel at trial were unfounded. Petitioner has filed no objections to the Magistrate's recommendations.

Having made a careful and independent review of the record in this case, including that developed before the Magistrate, this Court is of the opinion that the Magistrate's recommendations are well taken, and should be adopted by this Court. It is accordingly

ORDERED, ADJUDGED and DECREED that the United States Magistrate's Memorandum and Recommendation is hereby ADOPTED and incorporated by reference into this Order, which shall constitute findings of fact and conclusions of law, and that the Petitioner's application for writ of habeas corpus be, and hereby is, DENIED.

Entered this 29 day of March, 1979, at Austin, Texas.

JACK ROBERTS
UNITED STATES DISTRICT JUDGE

17

(Petitioner)

FILED
MAR 30 1979
CHARLES W. VAGNER, Clerk
By Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

BURRELL JOHNSON, JR. I
I
V. I CIVIL ACTION NO. W-77-CA-128
I
W. J. ESTELLE, JR., DIRECTOR, I
TEXAS DEPARTMENT OF CORRECTIONS I

JUDGMENT

This action came on for consideration by the Court, Honorable Jack Roberts, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and ADJUDGED

that the United States Magistrate's Memorandum and Recommendation is ADOPTED and incorporated by reference into the Court's order, which shall constitute findings of fact and conclusions of law, and that the Petitioner's application for writ of habeas corpus is DENIED.

Dated at Waco, Texas, this 30th day of March, 1979.

CHARLES W. VAGNER
UNITED STATES DISTRICT CLERK

By Ruth Downey
Deputy U.S. District Clerk

a.m. 2:45 p.m. o'clock

FEB 13 1980

D. CARPENTER
District Court, Bell County, Texas
By Adams Deputy

NO. 22,009

BURRELL JOHNSON	†	IN THE 27TH DISTRICT COURT
VS.	†	OF
W.J. ESTELL, JR., DIRECTOR OF TEXAS DEPARTMENT OF CORRECTIONS	†	BELL COUNTY, TEXAS

ORDER

On this day came on for consideration the Petitioner's Application for Writ of Habeas Corpus, and having considered the same, the Court enters the following findings of fact, conclusions of law and recommendations:

I.

HISTORY OF THE CASE

The Petitioner is presently in custody of the Texas Department of Corrections by virtue of a judgment and sentence issued in Cause No. 22,009 in the 27th District Court of Bell County, Texas for the offense of Murder. The Petitioner plead not guilty to the indictment and was tried before a jury which found him guilty of Murder and assessed his punishment at 99 years in the Texas Department of Corrections. From this conviction, due appeal was taken, and the conviction was affirmed and an opinion was delivered on September 17, 1975 in Cause No. 50,136.

II.

ALLEGATIONS OF THE PETITIONER

The Petitioner alleges that his conviction is void for the reason that the Court erred in not admitting the testimony of an expert in karate that the deceased was capable of delivering a killing blow.

III.

NECESSITY FOR AN EVIDENTIARY HEARING

There is no necessity for an evidentiary hearing for the reason that there is no fact and issue that cannot be determined with certainty from the record.

"Appendix-J"

IV.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

The Petitioner's complaint that the Court erred in not admitting certain testimony of an expert in karate that the deceased was capable of delivering a killing blow is the same issue that the Petitioner raised upon direct appeal of this cause. That issue was decided against the Petitioner and it is not necessary that this Court address the issue again.

V.

Having considered the Petitioner's Application for Writ of Habeas Corpus, this Court is of the opinion that the Application is without merit and should be denied. It is accordingly ordered that the Clerk of this Court transmit the Application for Habeas Corpus and this Order to the Court of Criminal Appeals in Austin together with all papers relevant to this cause. It is the further order of this Court that the clerk serve a copy of this Order upon the Petitioner by mailing a copy to him, Burrell Johnson, Jr., #241395, Route 1, Box 1, A2-37, Huntsville, Texas, 77340.

Signed this the 14 day of January, 1980.

William R. Clark
Judge Presiding

Rec. 1-13-81

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

FILED

JAN 09 1981

CHARLES W. VAGNER, Clerk

By Deputy

BURRELL JOHNSON, JR., I

Petitioner, I

vs. I CIVIL ACTION NO. W-80-CA-57

W.J. ESTELLE, JR., I

Respondent I

ORDER DENYING CERTIFICATE OF PROBABLE CAUSE

The Court has considered Petitioner's motion for issuance of a certificate of probable cause, and finds that same should be denied because any appeal of this Court's judgment in this case is purely frivolous and without merit.

It is, therefore, ORDERED, ADJUDGED and DECREED that Petitioner's motion for issuance of a certificate of probable cause is hereby denied.

Signed and entered this 23 day of Dec., 1980.

Fred Shannon

Fred Shannon, United States District Judge

"Appendix-K"

U.S. COURT OF APPEALS
FILED
APR 1981
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

FILED
APR 24 1981
CHARLES W. VAGNER, Clerk
By Deputy

No. 81-9008

W-80-CA-57

BURRELL JOHNSON, JR.,

Petitioner,

versus

W. J. ESTELLE, JR.,

Respondent.

- - - - -

On Application for Certificate of Probable Cause,
Leave to Appeal in Forma Pauperis
and for Appointment of Counsel

- - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is denied.

IT IS FURTHER ORDERED that petitioner's pro se application for appointment of counsel to represent him in this cause is denied.

Henry A. Politz
UNITED STATES CIRCUIT JUDGE

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. C... Fifth Circuit
By H. E. Adams, Jr.
Deputy
New Orleans, Louisiana APR 20 1981